A. Non-Justiciability

TVA argues (Br. in Opp. 7) that the Article III issue is "immaterial" here because the presence of the interveners would keep the case alive even if the dispute between TVA and EPA were held not to present a case or controversy under Article III. As the petition explains (Pet. 28), however, if the dispute between TVA and EPA is nonjusticiable (and EPA thus lacks the ability to enforce the ACO judicially against TVA), then all of the petitions for review should be dismissed, because EPA's order, which is directed solely to TVA, would not be final under *Bennett* v. *Spear*, 520 U.S. 154 (1997). Neither TVA nor the interveners dispute that further Executive Branch review of the order would be required in these circumstances (see Pet. 28 n.13), and the order thus would not satisfy the first *Bennett* prong. 520 U.S. at 177-178 (requiring "consummation" of decisionmaking process).[5] Accordingly, the Court's jurisdiction over this case as a whole depends on whether the intra-governmental dispute between TVA and EPA presents an Article III case or controversy.

In support of the court of appeals' Article III holding, TVA, as had the court of appeals, relies primarily (Br. in Opp. 16-17) on *United States* v. *Nixon*, 418 U.S. 683, 693 (1974).[6] The Court in *Nixon*, however, went to great lengths

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[5] Similarly, pending such a consummation, the possibility of a citizen suit against TVA to enforce EPA's order would not support interveners' standing, see Br. in Opp. 18 n.13, because the non-final order would not support such a suit. In any event, citizens may sue for violations of emissions standards or permit requirements regardless of whether EPA has issued an order. 42 U.S.C. 7604(a)(1) and (3).

[6] TVA asserts (Br. in Opp. 17) that "[t]he [Act] unambiguously authorizes EPA to sue TVA" in authorizing EPA to file suit against "any person"—defined elsewhere to include federal agencies—in court. The cited provision, however, is naturally read to authorize EPA suits only when Article III jurisdiction is otherwise present, regardless of whether the suit is against a federal agency or a private individual. TVA thus errs (*id.* at 18) in claiming that holding this case to be nonjusticiable would "require treating the civil judicial enforcement provisions of [the Clean Air

to emphasize the "unique setting," *id.* at 691, of a criminal prosecution of a sitting President by an independent special prosecutor with unusual independence from the Attorney General. As the Court explained, the special prosecutor enjoyed a tenure tantamount to an independent agency, which the Court described as

> not an ordinary delegation by the Attorney General to a subordinate officer: with the authorization of the President, the Acting Attorney General provided in the regulation that the Special Prosecutor was not to be removed without the 'consensus' of eight designated leaders of Congress.

Id. at 696. *Nixon* was not an ordinary case, nor did it realistically present the possibility that this case does of a single entity controlling both parties to a justiciable case or controversy.[7] The court of appeals erred in relying on *Nixon* to state a broad and generally applicable rule that intra-agency disputes are justiciable so long as a similar dispute between private parties would have been justiciable, see Pet. App. 73a, and the agencies advocate genuinely conflicting points of view, see *id.* at 74a.

B. TVA's Independent Litigation Authority

Further review is also warranted of the court of appeals' conclusion that TVA had authority to litigate this case independently and over the objection of the Attorney General. Pet. 23-27. TVA fails to identify any statutory source creating an exception to the statutory requirement that "the

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Act] as *un*constitutional." Those provisions are susceptible of a perfectly constitutional construction, regardless of the correct disposition of this case.

[7] Although TVA states (Br. in Opp. 15 n.11) that whether TVA's Board members serve at the pleasure of the President is "an issue never decided by this Court," TVA conspicuously does not argue that its Board members could continue to serve despite a decision by the President to remove them. See *Keim* v. *United States*, 177 U.S. 290, 293 (1900) ("In the absence of specific provision to the contrary, the power of removal from office is incident to the power of appointment.").

conduct of litigation in which the United States, an agency, or officer thereof is a party * * * is reserved to officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. 516. See also 28 U.S.C. 519.

TVA does refer (Br. in Opp. 8-9) to its history of representing itself in court. Even if TVA's history compelled recognition of some sort of implicit delegation of litigating authority by the Attorney General, however, no such delegation would remain valid when, as here, the Attorney General has positively objected to the litigation. TVA also cites (*id.* at 9 & n.4) the general authority granted to its board of directors, but that general authority is entirely consistent with the overriding authority of the Attorney General to control the "conduct of litigation" of all government agencies —including TVA—in court. 28 U.S.C. 516. In any event, in the face of the express statutory committal of litigating responsibility to the Attorney General, something more than congressional committee reports (Br. in Opp. 10-12 & n.7) or a statute disavowing any effect on whatever litigating authority TVA may have had (*id.* at 9 n.6) is necessary to establish that Congress intended an exception.

This case, in which an important part of an Act of Congress was held unconstitutional in a case brought by a federal agency, is a textbook example of the need for the Attorney General, who represents the overall interests of the federal government, to control government litigation as provided by statute. Further review of the court of appeals' conclusion that TVA has authority to litigate over the objection of the Attorney General is warranted.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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